Filed 4/6/10 P. v. Chubbs CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RAFAEL JIOVONNI CHUBBS, Defendant and Appellant.	H033510 (Monterey County Super. Ct. No. SS053372)

Defendant Rafael Jiovonni Chubbs pleaded guilty to inflicting corporal injury on a cohabitant (Pen. Code, § 273.5, subd. (a)) and was placed on probation. He was subsequently alleged to have violated his probation by possessing cocaine. At the hearing on the probation violation allegation, the prosecution introduced a laboratory report to show that the substance was cocaine. The report was admitted into evidence over defendant's hearsay objection. The prosecution also introduced evidence of defendant's statements to a police officer who questioned defendant about the cocaine after advising him of his constitutional rights. After defendant's friend testified that defendant was unaware of the presence of the cocaine in the car, and the friend admitted that he used cocaine, the prosecutor was permitted to amend the petition to allege that defendant had violated his probation by associating with a cocaine user. The court found both probation violation allegations true. Defendant's probation was revoked, and he was committed to state prison for a three-year term.

On appeal, defendant contends that the trial court erred at the probation violation hearing in (1) failing to exclude his statements to the officer, (2) admitting the laboratory report, (3) allowing the amendment of the petition, and (4) finding that defendant was aware that his friend used cocaine. He also contends that his trial counsel was prejudicially deficient in failing to object to revocation based on the association probation condition. Finally, defendant challenges the trial court's imposition of a $600 restitution fund fine and a $600 parole revocation restitution fine after the court revoked probation because the court had already imposed a $200 restitution fund fine when it placed defendant on probation. The Attorney General concedes this last challenge. We accept that concession but reject all of defendant's other contentions. We modify the judgment to correct the court's error in regard to the fines.

I. Background

In December 2005, defendant assaulted his former girlfriend, who resided with him and their daughter. The assault occurred in the presence of his former girlfriend's son. Defendant was charged by complaint with inflicting corporal injury on a cohabitant (Pen. Code, § 273.5, subd. (a)), felony false imprisonment (Pen. Code, §§ 236, 237, subd. (a)), and misdemeanor child endangerment (Pen. Code, § 273a, subd. (b)). He pleaded guilty to the infliction of corporal injury count on the condition that he receive felony probation and the remaining counts be dismissed.

In January 2006, the court suspended imposition of sentence and placed defendant on probation for three years. The probation conditions required defendant to "obey all laws" and "not to use or possess alcohol, narcotics, drugs or other controlled substances without the prescription of a physician, [and] not traffic in or associate with persons who use or traffic in narcotics or other controlled substances." An 80-day jail term was satisfied by credit for time served. The court imposed a $200 restitution fund fine and an additional $200 probation revocation restitution fine.

Defendant's probation was revoked and reinstated in November 2006 after he violated his probation. In January 2007, defendant's probation was again revoked after he admitted violating his probation. The court imposed a three-year prison sentence, suspended execution of sentence, and again placed defendant on probation with a 273-day jail term that was satisfied by credit for time served.

On April 30, 2008, the probation department filed a petition alleging that defendant had violated his probation a third time by possessing cocaine and driving on a suspended license. On August 15, 2008, a formal probation violation hearing was held on the April 2008 petition.

The prosecution presented a single witness, Yerani Mirabal, a Hialeah, Florida police officer. Mirabal testified that he arrived at a traffic stop near a strip club at 2:00 a.m. on April 12, 2008 as "back up" for another officer. Mirabal found defendant talking to another officer outside of a vehicle. The other officer arrested defendant for driving with a suspended license. Because the vehicle was going to be impounded, Mirabal conducted a standard inventory search of it. When Mirabal looked into the vehicle, he immediately saw a clear plastic baggie containing a white powder on the center console between the seats under the radio. Mirabal could tell that the baggie contained more than 10 grams of powder.

Mirabal then informed defendant of his constitutional rights and asked him if he understood his rights. Defendant did not respond to this inquiry, but he answered all of the questions that Mirabal proceeded to ask after the advisements. Mirabal asked defendant "what the white powder was," and defendant responded "Cocaine." Defendant told Mirabal that the cocaine was for his personal use. Defendant said the vehicle was not his car; he said the car belonged to Kenny Luxama.[1]

---

[1] The vehicle was actually a rental car. Luxama testified that he had been renting the car for a month before defendant's arrest.

The baggie was sent to the laboratory that the Hialeah police department regularly used to test drugs, and Mirabal subsequently "received the results back" from the laboratory. Mirabal identified exhibit 1 as the "laboratory analysis report" he had received. When the prosecutor asked Mirabal: "What are the lab findings in that report," defendant's trial counsel objected on best evidence and personal knowledge grounds. The court overruled the objection, and Mirabal testified that the laboratory finding "[c]ame back as positive for cocaine."

On cross-examination, defendant's trial counsel asked Mirabal what defendant's response was to being advised of his constitutional rights. Mirabal testified: "He basically just didn't talk. He didn't answer any questions. When I asked him if -- when it came to the part that I asked him do you wish to have an attorney present, he just kept silence [*sic*]." When Mirabal asked defendant if he was "waiving these rights," "[h]is response was he just answered questions that I asked."

When the prosecutor moved for admission of exhibit 1, defendant's trial counsel objected on hearsay grounds. Exhibit 1 is a one-page document dated April 30, 2008, headed "Miami-Dade Police Department [¶] Crime Laboratory Bureau," and titled "Drug Analysis Unit: [¶] Laboratory Analysis Report." The report is addressed to Mirabal and identifies defendant as the subject. It states: "On 04/16/2008, the following evidence was submitted to the laboratory by Civilian Roxana Deleon, Hialeah Police Department." The report identifies the evidence as "Plastic bag/baggie containing suspect powder cocaine," and it recites that the "Laboratory Findings" were "Cocaine Less than 28 gram(s)." The report is signed by a person identified as a "Criminalist 1." The prosecutor asserted that exhibit 1 was "reliable hearsay" evidence, which was admissible at a probation hearing. The court overruled the defense hearsay objection and admitted exhibit 1 into evidence.

The sole defense witness at the hearing was Luxama, a longtime friend of defendant who was also defendant's employer at the time of his arrest. Luxama testified

that he had driven defendant to a strip club on the evening of defendant's arrest. When he picked defendant up to go to the strip club, Luxama had "[w]hite powder" inside of the center console in a closed compartment. Luxama testified that defendant never saw the powder and was unaware of its presence. Luxama testified that this white powder had been left accidentally on a seat in the car by another man earlier that day, and Luxama had put it inside the center console and forgotten that it was there. Luxama admitted that he "sometimes" used cocaine, but he asserted that he did not sell cocaine and had never used cocaine in defendant's presence.

While they were at the strip club, the bouncer told Luxama that he needed to move his car, and Luxama asked defendant to move the car for him. A little later, Luxama went outside and saw defendant being arrested. Luxama testified that he told the police officer that the car was his, and the police officer "said they would give it to me before they leave." Luxama went back into the strip club. He later learned that the police had towed the car away.

After Luxama's testimony, the defense rested, and the prosecutor sought to amend the petition to add an allegation that defendant had violated his probation by "associating with those who use or sale [*sic*] controlled substances." Defendant's trial counsel objected on due process notice grounds. The prosecutor asserted that "we have no problem if the Court wants to just put that part over for a separate hearing, however, we are prepare[d] to put a rebuttal witness on. However, we would like to go forward on the amended petition as well." The court said: "Well, the Court just heard the testimony. The Court could take judicial notice of what the Court has heard. So in light of that, the amendment would be allowed." The court asked defendant's trial counsel if he wished to call any other witnesses, and he declined. The prosecution recalled Mirabal, who testified that he had found nothing inside the closed armrest compartment that was part of the center console between the seats.

Defendant's trial counsel argued that the newly added association allegation was not true because there was no evidence that defendant knew Luxama used cocaine. He argued that the possession of cocaine allegation was untrue because Luxama had testified that the cocaine was in his possession and defendant was unaware of that fact. The prosecutor argued that Luxama was not a credible witness, and defendant must have been aware of his longtime friend's cocaine use. At the conclusion of defendant's trial counsel's rebuttal argument, he asserted: "The final thing with regards to the Miranda, the officer testified that he read him the rights, my client remained silent to say anything. Didn't say he waived those rights. My recollection was he didn't say he understood those right [*sic*], he just remained silent. The officer at that point continued to question him."

The trial court made an express finding that Luxama's testimony was "unbelievable." The court found the possession and association allegations true, but it found the driving on a suspended license allegation not true. The court revoked defendant's probation and ordered execution of the suspended three-year prison term. The court also imposed a $600 restitution fund fine and a $600 suspended parole revocation restitution fine. Defendant filed a timely notice of appeal.

II. Discussion

A. Defendant's Statements to Mirabal

Defendant contends on appeal that his statements to Mirabal should have been excluded at the hearing because "defendant's admission was obtained in blatant disregard of *Miranda*." The Attorney General contends that defendant forfeited this contention by failing to object below to the admission of these statements.[2]

---

[2] Defendant did not file a reply brief on appeal, and his opening brief does not acknowledge the absence of any objection below to the admission of this evidence. Thus, he does not contend that his trial counsel was prejudicially deficient in failing to interpose such an objection.

"A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to . . . the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and [¶] (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice." (Evid. Code, § 353.)

Defendant's trial counsel made no objection when Mirabal testified to defendant's statements on direct examination. He cross-examined Mirabal about the circumstances under which defendant had made these statements, but he still interposed no objection to their admission. In his rebuttal argument to the court at the conclusion of the hearing, defendant's trial counsel mentioned the question of whether defendant had waived his constitutional rights before making the statements, but he did not ask the court to strike or disregard Mirabal's testimony about the statements or seek any other ruling from the trial court with regard to the admissibility of the statements.

The record does not contain any evidence that defendant's trial counsel made a timely objection to the admission of evidence of defendant's statements to Mirabal on any grounds whatsoever. Consequently, defendant is precluded from obtaining a reversal of the judgment on this ground. (Evid. Code, § 353.)

B. Exhibit 1

Defendant asserts that the trial court prejudicially erred in overruling his objections to the admission of exhibit 1 and to Mirabal's testimony about exhibit 1. He claims that this evidence should have been excluded as hearsay and that its admission violated his due process rights.

The trial court did not abuse its discretion in admitting exhibit 1 and Mirabal's testimony about it over defendant's hearsay objection.[3] "As long as hearsay testimony bears a substantial degree of trust-worthiness it may legitimately be used at a probation revocation proceeding. [Citations.] In general, the court will find hearsay evidence trustworthy when there are sufficient 'indicia of reliability.' [Citation.] Such a determination rests within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." (*People v. Brown* (1989) 215 Cal.App.3d 452, 454-455.)

There were substantial indicia that exhibit 1 reliably documented the results of the testing of the white powder found in defendant's possession. Mirabal testified that the baggie of white powder was sent to the laboratory for testing, and he identified exhibit 1 as the "laboratory analysis report" that he received back from the laboratory. He explained that the police department regularly used this laboratory, another police department's laboratory, for testing evidence. Exhibit 1 stated that it was a "Laboratory Analysis Report" on a "baggie containing suspect powder cocaine" that had been submitted by the Hialeah Police Department in connection with defendant's case. Exhibit 1's "Laboratory Findings" were "Cocaine less than 28 grams(s)." Exhibit 1 was signed by a person identified as a "Criminalist 1." These indicia reliably demonstrated that a qualified person had performed a laboratory analysis of the white powder in the baggie and concluded that it was cocaine.

Defendant contends that exhibit 1 lacked reliability because it "does not specify that the white powder even was tested, nor does it indicate that the powder contained

---

[3] Defendant actually interposed only personal knowledge and best evidence objections to Mirabal's testimony about exhibit 1, and he does not renew those contentions on appeal. His appellate contentions are restricted to the hearsay contention, which he raised only as to the admission of exhibit 1 below, and his due process claim, which he did not raise below.

more than traces of cocaine." Not so. Exhibit 1 clearly states that the powder in the baggie was subjected to analysis and found to contain cocaine. Analysis is testing. While the specific concentration of cocaine in the powder is not addressed by exhibit 1, such a finding was not necessary to the admission of the report or to support the finding that defendant had violated his probation by possessing cocaine.

Defendant also contends on appeal that the admission of exhibit 1 deprived him of "his due process right to confront the author of Exhibit 1." "Although probation violation hearings involve the criminal justice system, they are not governed by all the procedural safeguards of a criminal trial. [Citations.] Specifically the Sixth Amendment's right of confrontation does not apply to probation violation hearings. [Citation.] A defendant's right to cross-examine and confront witnesses at a violation hearing stems, rather, from the due process clause of the Fourteenth Amendment. [Citations.] Those confrontation rights, however, are not absolute, and where appropriate, witnesses may give evidence by '"affidavits, depositions, and documentary evidence."' [Citations.] [¶] . . . We review rulings on whether hearsay was improperly admitted at a violation hearing for abuse of discretion." (*People v. Abrams* (2007) 158 Cal.App.4th 396, 400, fn. omitted (*Abrams*).)

In *People v. Johnson* (2004) 121 Cal.App.4th 1409 (*Johnson*), the defendant claimed that the admission of a laboratory report at a probation revocation hearing "violated his constitutional rights under *Crawford v. Washington* (2004) 541 U.S. 36 [*Crawford*]." (*Johnson*, at p. 1410.) The First District Court of Appeal noted that *Crawford* was a Sixth Amendment case and that the Sixth Amendment does not apply at probation revocation hearings. (*Johnson*, at p. 1411.) Consequently, *Crawford* did not alter the due process analysis that applies to the admissibility of hearsay at a probation revocation hearing. (*Ibid*.) The First District held that, under the California Supreme Court's analysis in *People v. Arreola* (1994) 7 Cal.4th 1144 (*Arreola*), due process was not violated by the admission of the laboratory report. (*Johnson*, at pp. 1412-1413.)

"[T]he laboratory report was not a substitute for live testimony at Johnson's revocation hearing; it was routine documentary evidence." (*Johnson*, at p. 1413.)

Defendant claims that *Johnson* "was criticized in *Geier* on the ground that laboratory reports were not testimonial in nature, and therefore did not trigger Confrontation Clause considerations." Defendant has misread the California Supreme Court's discussion of *Johnson* in *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*). *Geier* addressed a challenge under the Sixth Amendment's Confrontation Clause to the admissibility of DNA test results at a criminal trial through the testimony of someone other than the person who had performed the testing. (*Geier*, at p. 596.) Because the Confrontation Clause applies only to *testimonial* hearsay (*Whorton v. Bockting* (2007) 549 U.S. 406, 419-420), the California Supreme Court examined the cases that had considered whether scientific evidence qualified as testimonial hearsay. (*Geier*, at pp. 598-600.) *Johnson* was mentioned as a case in which the court had considered whether a laboratory report qualified as "'testimonial' hearsay." *Johnson* had concluded that a laboratory report was *not* testimonial hearsay. (*Johnson*, *supra*, 121 Cal.App.4th at pp. 1412-1413.) *Geier* quoted extensively from *Johnson*. It is an extensive quote from *Johnson* in *Geier* that defendant quotes in his brief in support of his claim that *Geier* criticized *Johnson*. He provides no explanation for why he believes that the California Supreme Court was criticizing *Johnson* when it quoted it extensively and then concluded, like *Johnson*, that scientific evidence is *not* testimonial hearsay. Defendant *does* explain why he disagrees with *Geier*'s conclusion that scientific evidence is not testimonial hearsay. However, we need not consider the validity of *Geier*'s conclusion that scientific evidence is not testimonial hearsay for Sixth Amendment purposes, as that conclusion is

relevant only to the application of the Confrontation Clause, which does not apply at probation violation hearings.[4] (*Abrams*, *supra*, 158 Cal.App.4th at p. 400.)

Since the Sixth Amendment does not apply at probation revocation proceedings, *Arreola* remains the standard for due process challenges to the admission of hearsay evidence at probation revocation proceedings. *Arreola* concluded that the due process requirements at a probation revocation proceeding differ based on the type of hearsay evidence in question. "[T]he need for confrontation is particularly important where the evidence is testimonial, because of the opportunity for observation of the witness's demeanor. [Citation.] Generally, the witness's demeanor is not a significant factor in evaluating foundational testimony relating to the admission of evidence *such as laboratory reports*, invoices, or receipts, where often the purpose of this testimony simply is to authenticate the documentary material, and where the author, signator, or custodian of the document ordinarily would be unable to recall from actual memory information relating to the specific contents of the writing and would rely instead upon the record of his or her own action." (*Arreola, supra*, 7 Cal.4th at p. 1157, italics added.)

Here, the demeanor of the person who prepared exhibit 1 was not a significant factor in evaluating the reliability of the laboratory report as the preparer would ordinarily be unable to recall the contents of the report from memory and would simply rely on the report. Confrontation and cross-examination of such a witness would have little or no value. Thus, defendant's due process rights were not violated by the admission of exhibit 1.

---

[4] The validity of *Geier* after the United States Supreme Court's decision in *Melendez-Diaz v. Massachusetts* (2009) __ U.S. __ [129 S.Ct. 2527] (*Melendez-Diaz*) is currently before the California Supreme Court in *People v. Dungo*, review granted December 2, 2009, S176886. *Geier* and *Melendez-Diaz* concern the Sixth Amendment, which is not implicated in this case.

C. Association Violation

Defendant maintains that the trial court violated his right to due process by allowing the prosecution to amend the petition at the close of the hearing to add an allegation that defendant had violated his probation by associating with a cocaine user. While the trial court arguably erred in allowing this amendment, we can conceive of no prejudice to defendant from the amendment.

The amendment of the petition resulted in the trial court finding that defendant had violated his probation not only by possessing cocaine but also by associating with a cocaine user. The "'harmless-beyond-a-reasonable-doubt'" standard of review applies to a federal constitutional error at a probation violation hearing. (*Arreola*, *supra*, 7 Cal.4th at p. 1161.) "The beyond-a-reasonable-doubt standard of *Chapman* 'requir[es] the beneficiary of a [federal] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the [result].' (*Chapman* [*v. California* (1967)] 386 U.S. [18] at p. 24, 87 S.Ct. 824.) 'To say that an error did not contribute to the ensuing [decision] is . . . to find that error unimportant in relation to everything else the [decisionmaker] considered on the issue in question, as revealed in the record.' (*Yates v. Evatt* (1991) 500 U.S. 391, 403, 111 S.Ct. 1884, 114 L.Ed.2d 432.) Thus, the focus is what the [decisionmaker] actually decided and whether the error might have tainted its decision. That is to say, the issue is 'whether the . . . [decision] actually rendered in *this* trial was surely unattributable to the error.' (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, 113 S.Ct. 2078, 124 L.Ed.2d 182.)" (*People v. Neal* (2003) 31 Cal.4th 63, 86.)

Here, the cocaine possession violation was a very serious probation violation, and the association violation was of comparatively little significance. Thus, the court's finding of an association violation was "unimportant in relation to everything else" that the court considered with respect to the revocation decision, and the revocation decision was "surely unattributable" to the court's finding on the association violation. It follows

that any due process violation in connection with the association violation did not influence the court's decision to revoke probation.[5]

Defendant also contends that there was insufficient evidence to establish the association violation because there was no evidence he knew of Luxama's cocaine use. Since we have already concluded that the trial court's true finding on the association allegation was harmless beyond a reasonable doubt, this contention too must fail. The same is true for defendant's claim that his trial counsel was prejudicially deficient in failing to object to revocation based on the association condition because the condition was unconstitutional. As the trial court's true finding on the association allegation was harmless beyond a reasonable doubt, any deficiency of his counsel in this regard was not prejudicial.

D. Restitution Fine

The trial court imposed a $200 Penal Code section 1202.4, subdivision (b) restitution fund fine and an additional Penal Code section 1202.44 probation revocation restitution fine when it originally placed defendant on probation. After the court revoked probation, it imposed a $600 Penal Code section 1202.4, subdivision (b) restitution fund fine and a $600 Penal Code section 1202.45 parole revocation restitution fine.

Defendant challenges the imposition of the $600 restitution fund fine and the amount of the $600 parole revocation fine. Once a restitution fund fine has been imposed upon the granting of probation, the trial court may not impose another restitution fund fine upon the revocation of probation. (*People v. Chambers* (1998) 65 Cal.App.4th 819, 822-823.) Hence, the $600 restitution fund fine must be stricken. The parole revocation restitution fine must be imposed in the same amount as the restitution fund fine. (Pen.

---

[5] Defendant does not argue that he suffered any prejudice from this amendment unless the possession violation was also invalid, and we have rejected his contentions regarding the possession violation.

Code, § 1202.45.) Because the valid restitution fund fine is $200, the parole revocation restitution fine must be $200. The Attorney General concedes this issue. We will modify the judgment accordingly.

III. Disposition

The judgment is modified to reflect that a single $200 restitution fund fine was imposed under Penal Code 1202.4, subdivision (b), and a $200 suspended parole revocation restitution fine was imposed under Penal Code section 1202.45. The trial court shall prepare an amended abstract of judgment reflecting these modifications and forward a certified copy of the abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

_____
Mihara, J.

WE CONCUR:

_____
Elia, Acting P. J.

_____
McAdams, J.